No. 682.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MISSION ROCK COMPANY,
Defendant and Plaintiff in Error.

vs.

THE UNITED STATES,
Plaintiff and Defendant in Error.

Brief on Behalf of Plaintiff in Error.

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BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

The facts of this case have been specially found by the Court below. There is no dispute about their correctness. They are as follows:

The lands sued for in this action lie in the Bay of San Francisco, about half a mile from the original shore line of the peninsula on which San Francisco stands. All of the lands, fourteen acres, less a piece, which if rectagonal, would be seventy-eight feet square, generally known as "Mission Rock" and another adja-

cent piece, twenty feet square, are submerged lands over which the tide waters continuously ebb and flow. The excepted pieces are rocks, the larger of which rises above high tide between twenty and forty feet. These rocks are barren. They contain neither soil nor water and are useless for any purpose, either agricultural or mineral. This was their condition on September 9, 1850, the date of the admission of California into the Union.

On the 4th day of April, 1870, the Legislature of California authorized the issuing of a patent for the lands sued for to one Tichenor upon payment of certain moneys by him and proof that he had, before patent issued, constructed at Mission Rock, a marine railway or dry dock. On the 11th day of July, 1872, the patent of the State, which recited the fact of Tichenor's compliance with the conditions of the Act, was issued to him. The California Dry Dock Company became the purchaser of the premises in 1878. After that date it proceeded to and did reclaim enough of the lands conveyed, by filling in with rock, to make an area of four acres, upon which extensive warehouses were built for commercial purposes, and from which wharves were built out to accommodate shipping. From the date of the conveyance of these lands to the Dock Company, it was in exclusive possession, claiming ownership, until June 6th, 1900, when it conveyed them to the Mission Rock Company, plaintiff in error.

In 1894, the United States Engineer officer in charge

of harbor work in San Francisco delineated on a map the limits beyond which further filling by the Dock Company must not go. This map was approved by the Secretary of War. A copy of it, with written notice of the prohibition of filling in, was served on the company.

On the 13th day of January, 1899, the President, purporting to act under the provisions of the Act of Congress, approved July 1st, 1864, designated and set apart for naval purposes, "Mission Rock", containing fourteen one-hundredths of an acre and the smaller adjacent rock already referred to, containing one one-hundredth of an acre.

This suit embraces far more than the land set apart by the order of the President.

Upon these facts, the judgment of the Court below was rendered in favor of the United States.

The plaintiff in error assigns the following errors in the conclusion of the Court:

a. The Court erred in deciding that the title to the submerged lands around Mission Rock did not vest in the State of California on its admission into the Union.

b. The Court erred in deciding that those portions of the lands described in the complaint which are shown by the findings to have been above the line of ordinary high water mark, were and are lands the title whereof was and remained, after the admission of the State of California into the Union, in the United States

and not in the State of California.

c. The Court erred in deciding that under the Act of July 1, 1864 (13 Stat. 332) relinquishing to the City of San Francisco the lands described in said act, the United States excepted from such relinquishment the lands described in the complaint or any part thereof.

d. The Court erred in deciding that it was within the power of the President under the said Act to designate the said lands, or any of them, as excepted from the relinquishment made in said Act, or that his act in so designating them as excepted, did in law or in fact devest the title thereto of the said city.

e. The Court erred in deciding that the designation made by the President under the said Act included anything more than the specific acreage of the lands sued for lying above high water mark stated in the said order.

f. The Court erred in holding that an action of ejectment would lie for the recovery of lands, the title to which had been fully relinquished by the United States in favor of the City of San Francisco, subject to a right of subsequent reservation by the President of such parts as he might thereafter designate.

g. The Court erred in deciding that the reservation in the Act of 1864 was not void, and that by the act of the President, nearly forty years later, designating said lands sued for, or any part of them, as reserved, the title thereto again became vested in the United States.

h. The Court erred in deciding upon the facts found, that judgment should be entered in favor of the United States and against the Mission Rock Company.

The foregoing assignments bring before the Court all of the questions which arise in the case. Some of these questions, as it seems to us, will not be reached by the Court for discussion, for the reason that the authoritative judgments of the Supreme Court on the State's title to and right of disposition of the lands within its limits covered by navigable waters, would seem to dis pose of the entire controversy.

The learned Judge of the Court below was of the opinion that tide or tidal lands, if such lands exist at all, within the meaning of the law, around islands, are such lands as are covered and uncovered by the flow and ebb of the daily tides; not lands which are continuously submerged by tide waters. If the State has the power to convey submerged lands, he sees "no rea- " son why it may not convey as submerged lands the " entire bottom of San Francisco Bay". The learned Judge further holds that, owing to the precipitous formation of "Mission Rock", there is, practically, no part of it which is covered and uncovered by the tide. Another objection found by the Judge against the defense of the plaintiff in error is that the right of the United States to approach islands, if it owned them, would be seriously affected by the ownership of the contiguous submerged lands by private persons. Finally, the opinion indicates the belief of the Judge

that though the title to the rocks had passed out of the United States by relinquishment under the Act of 1864, it had been revested with the title by the President's designation of them as reserved by the executive order of January, 1899. These views will, we think, be found to be erroneous.

The position of the plaintiff in error, that of the United States, as presented by the learned District Attorney and the opinion of the lower Court will be considered in this brief under the following heads:

1. *The submerged or tide lands became the property of the State on its admission. This right of property included the right to dispose of the land in its discretion, subject only to the right of control by the national government, if such disposition should interfere with the primary use of the waters over them as a means of commerce.*

2. "*Mission Rock*", *and the adjacent rocks, caps above the water's surface, were and are parts of the tidal lands, within the meaning of the constitutional principle which gives to each of the sovereign States its navigable waters and the soils under them.*

3. *The admission of the State on an equal footing with the original States gave to it all property above and below high water, not already given into private ownership or not reserved by the United States in the Act of admission. The reservation in that Act was of "public lands". These rocks were not "public lands".*

4. *The Act of 1864 did not relinquish any claim of the United States to tidal lands or to rocks in the bay. That Act referred to lands on the mainland. Hence, the President's reservation of "Mission Rock" was nugatory.*

5. *Assuming that "Mission Rock" was included in the meaning of the Act, then the title passed to the City of San Francisco. It has not since been revested in the United States, so that the latter can maintain ejectment for the rock.*

I.

The submerged or tide lands became the property of the State on its admission. This right of property included the right to dispose of the land in its discretion, subject only to the right of control by the national government, if such disposition should interfere with the primary use of the waters over them as a means of commerce.

The Act of September 9, 1850, admitted California into the Union "*on an equal footing* with the original States in all respects whatever", 9 *Stat.* 452, subject only to the conditions:

(*a*) That the new State "shall never interfere with " the primary disposal of the public lands within its " limits, and shall pass no law and do no act whereby " the title of the United States to, and right to dispose " of, the same shall be impaired or questioned".

(*b*) That the new State "shall never lay any tax or " assessment * * * upon the public domain of the " United States".

(*c*) That the new State "shall not tax non-resident citizens higher than residents".

(*d*) That the navigable waters within the State "shall be common highways, forever free to all citizens " without any tax, impost or duty therefor".

The admission of the new States "upon an equal foot- " ing in all respects whatever with the original States" was provided for by the Acts of cession by Virginia in 1784, whereby that State granted to the United States the great northwestern territory. This language was followed thereafter in all the Acts of Congress admitting new States. It is of great consequence in determining the right of California to the land in controversy in this action.

The first State admitted was Kentucky, in 1791, which was carved out of the Virginia territory. That State, therefore, came into the Union, as was provided in the statute of Virginia authorizing the cession, " having the same rights of sovereignty, freedom and " independence as the other States". (See *Pollard's Lessee* vs. *Hagan*, 3 How. 221.)

Regarding the rights of Alabama on the same subject, the Court said in the same case, (pp. 228, 229):

> "Alabama is, therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same ex-

> tent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the original states, the Constitution, laws and compact to the contrary notwithstanding."

This language is quoted by the Court in *Shively* vs. *Bowlby*, 152 U. S. 27 and is followed by the observation of the Court in that, its latest decision on the subject:

> "That these decisions do not * * * rest solely upon the deeds of cession from the State of Georgia to the United States, clearly appears from the constant recognition of the same doctrine as applicable to California, which was acquired from Mexico by the Treaty of Guadalupe Hidalgo of 1848." (*Citing many cases.*)

In *Illinois Central* vs. *Illinois*, 146 U. S. 434, the Court, referring to the right of Illinois under the Virginia cession to equality of right with the original States, asserts the same rule in unmistakable language, and adds:

> "The equality prescribed would have existed, if it had not been thus stipulated. There can be no distinction between the several States in the Union in the character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits."

In *Fort Leavenworth Co.* vs. *Lowe*, 114 U. S. 526, the Court said:

> "But in 1861 Kansas was admitted into the Union on an equal footing with the original States,

> that is, with the same rights of political dominion and sovereignty, subject like them only to the Constitution of the United States."

In this case it was held that when Kansas was admitted as a State, the military reservation of the United States, except the fort and ground immediately round it, became subject to the jurisdiction of Kansas. The United States

> "could have excepted the place from the jurisdiction of Kansas, as one needed for the general uses of the government. But from some cause, inadvertence perhaps, or over confidence that a recession of such jurisdiction could be had whenever desired, no such stipulation or exception was made. The United States, therefore, retained, after the admission of the State, only the rights of an ordinary proprietor. * * * So far as the land constituting the reservation was not used for military purposes, the possession of the United States was only that of an ordinary proprietor.', p. 526.

The accepted doctrine, therefore, as to the status of a State upon admission is that it thereby becomes endowed with all the rights over persons and property which the original States had and have, except so far as any such rights may be specially and expressly reserved by the United States

The original States, on adoption of the Constitution, surrendered certain rights and powers to the Federal Government. The new States, in joining the Union, surrendered the same rights and powers, but none other than those, unless the surrender of additional

powers was prescribed as a condition of admission. Therefore, whatever rights of property and dominion were retained by the original States, these were also retained by the new States, except so far as they had been expressly given up.

It has been uniformly held that upon the admission of a State into the Union, the tide lands or the lands under tide waters vest in the State.

The learned judge of the Circuit Court seems to have drawn a distinction between lands diurnally covered and uncovered by the tides and lands which are constantly covered by the tides, even when at their lowest stage. Such distinction does not exist. The sovereignty of a State (and upon this principle of sovereignty, the right and title to the waters of the State and the lands under them rests) cannot be satisfied by the ownership and control of a few feet of shore. In *Pollard* vs. *Hagan*, 3 How. 230, the Court said:

> " This right of domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdiction, and they, and they only, have the constitutional power to exercise it * * * * But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For although the territorial limits of Alabama have extended all her sovereign power *into the sea*, it is there, as on the shore, but municipal power, subject to the Constitution of the United States and 'the laws which shall be made in pursuance thereof'.

> By the preceding course of reasoning we have arrived at these general conclusions: First: The shores of navigable waters *and the soils under them*" (i. e. the soils under navigable waters) "were not granted by the Constitution to the United States but were reserved to the States respectively. Secondly: The new States have the same rights, sovereignty and jurisdiction over this subject as the original States. Thirdly: The right of the United States to the public lands and the power of Congress to make all needful rules and regulations for the disposition thereof, conferred no power to grant to the plaintiff the land in controversy in this case."

The land sued for lay below high water mark in Mobile Bay at the time of the admission of Alabama into the Union. The United States had given a patent to the land. This patent was held to convey no title. Most of the language above quoted was also quoted in *Gilman* vs. *Philadelphia*, 3 Wall. 726, as the sound principle governing the rights of the States to the soils under their waters.

In *Martin* vs. *Waddell*, 16 Pet. 410, the Court had already said:

> "When the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution."

The question thus decided has been passed upon by the Supreme Court in cases affecting California on several occasions. The lack of distinction between tide

lands and submerged lands, so far as the ownership of either by the State is concerned, has been already shown by the cases quoted from, which concede the State's title to the "navigable waters and the soils under them", as well as to the shores bordering on navigable waters. In *San Francisco* vs. *Leroy*, 138 U. S. 671, the Supreme Court defined the character of lands which passed to California on her admission.

> "The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide; but only those over which tide-waters flowed so continuously as to prevent their use and occupation. To render lands tide-lands which the State by virtue of her sovereignty could claim there must have been such *continuity* of the flow of tide-water over them, or such *regularity* of the flow within every twenty-four hours as to render them unfit for cultivation, the growth of grasses or other uses to which upland is applied." This definition was quoted in *Knight* vs. *U. S. Land Association*, 142 U. S. 186.

The decided cases show no such distinction as seems to have been made by the Judge who tried the cause at bar. In *Weber* vs. *Harbor Commissioners*, 18 Wall. 65, the application of the rule to submerged lands, lying exactly as the lands now in suit lie, was absolute. We quote the language of Justice Field:

The complainant's "land is situated nearly half a "mile from what was the shore of the Bay of San Fran- "cisco at the time California was admitted into the "Union, and over it the water at the *lowest tide* then "flowed at a depth sufficient to float vessels of ordinary

"size. Although the title to the soil under the tide-
"waters of the bay was acquired by the United States
"by cession from Mexico, equally with the title to the
"upland, they held it only in trust for the future State.
"Upon the admission of California into the Union upon
"equal footing with the original States, *absolute prop-*
"*erty in and dominion and sovereignty over all soils*
"*under the tidewaters within her limits passed to the*
"*State, with the consequent right to dispose of the title*
"*to any part of said soils in such manner as she might*
"*deem proper*, subject only to the paramount right of
"navigation on the waters, so far as such navigation
"might be required by the necessities of commerce with
"foreign nations or among the several States, the reg-
"ulation of which was vested in the general govern-
"ment."

It is common knowledge that all that part of the City of San Francisco below Montgomery street in places, and Sansome Street in other places as far east as the line of the present water front was once covered by tide waters. If the title to the lands round Mission Rock did not pass to the State of California on its admission as a State, the title to all of the now filled in lands in the area described, was never in the State. All of that property with its vast improvements including its wharves, therefore, would still belong to the United States. That these lands were submerged lands, the Court knows from the fact that the tides do not recede in this locality for a distance of a quarter of a

mile. The writer of this brief himself saw the remains of the ship "Niantic" dug up at the northwest corner of Clay and Sansome streets. On the other hand, if the United States has no title to such parts of San Francisco, it has no title to the filled in lands round Mission Rock. The untenableness of the position taken by the Court below may be well illustrated by the inquiry: Supposing a rocky cone to stand to-day at the corner of Front and California streets, what title would the occupants of all the surrounding lands, once not land, but navigable waters round the rock, have to their blocks of buildings? If their title should be deemed good, that of the Mission Rock Company is equally good.

The Court below assumed that the power of the State to grant any tract of land under the waters of the bay, if conceded, involved the power to grant away all of such lands. In this it fell into error. The case, *Illinois Central* vs. *Illinois*, 146 U. S. 452, distinctly recognizes that grants in limited quantities and for the public accommodation, may be made. The Court says:

> "The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, *for which purpose the State may grant parcels of the submerged lands*, and so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce and grants of parcels, which being occu-

> pied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of of an entire harbor or bay, or of a sea or lake."

The statute which granted the lands in controversy expressly provided for the building thereon of a marine railway. This was done, and since that time, docks and warehouses have been built on the reclaimed land. All these are in aid of commerce. They do not impair navigability. The United States itself now seeks to gain the property with the intention of using it as a coaling station. It does not complain that the State has violated a trust in making the grant. It does not propose to restore the reclaimed lands to the uses of navigation. It intends, as the President proclaims, to continue them in the same use as before, but as a government coaling station, not as docks and wharves for the convenience of the general public. This fact should be conclusive, under the *Illinois* case, that the State, if it had the title when it conveyed to Tichenor, made a grant of it which was in full discharge of the trust under which it had held the fee.

In *Lowndes* vs. *Huntington*, 153 U. S. 1, 30, the Court held that the grant of lands under the waters of Huntington Bay, from low water mark out, "for the

purposes of oyster cultivation", was valid. The Court said:

> " Either the title to these submerged lands passed by virtue of the colonial grants to the town of Huntington, or else it was in the State of New York (*Martin* vs. *Waddell*, 16 Pet. 367; *Pollard* vs. *Hagan*, 3 How. 212; *Shively* vs. *Bowlby*, 152 U. S. 1, and this Act" (of the Legislature of New York) "whose validity seems not to be questioned, cedes all the right, title and interest of the State in these lands to the town, so far at least as is necessary for the purpose of oyster cultivation."

The *Illinois* case further holds that the fact that there is no tide land in the Great Lakes, does not affect the right of the State. That right is the right to the soil under its navigable waters (146 U. S. 436).

See also

Morris vs. *U. S.*, 174 U. S. 236;
Mann vs. *Tacoma*, 153 U. S. 273;
Knight vs. *U. S. Assn.* 142 U. S. 183;
Hardin vs. *Jordan*, 140 U. S. 381;
Packer vs. *Bird*, 137 U. S. 382;
Co. of St. Clair vs. *Livingston*, 23 Wall. 64–68.
Barney vs. *Keokuk*, 94 U. S. 336–338;
Gilman vs. *Philadelphia*, 3 Wall. 726;
Mumford vs. *Wallace*, 6 Wall. 436;
Smith vs. *Maryland*, 18 How. 74;
Goodtitle vs. *Kibbe*, 9 How. 471.

The Supreme Court of California asserted the same doctrine in *Oakland Water Front Case*, 118 Cal. 182, while the claim of ownership in such lands is recognized by the statute of the State in the *Civil Code*, sec.

670. (A like statutory claim by Washington is referred to in *Mann* vs. *Tacoma*, 153 U. S. 284.)

The right of the State to its navigable waters includes the right to the fish in them and the use of the beds for the planting of oysters to the exclusion of the citizens of other States.

Macready vs. *Virginia*, 94 U. S. 391;
Smith vs. *Maryland*, 18 How. 74;
Trustees vs. *Lowndes*, 40 Fed. R. 630.

The United States may appropriate tide lands, though sold by the State, if the necessities of commerce shall require them, *but if they have been improved they can be taken only upon due compensation made.*

Scranton vs. *Wheeler*, 57 Fed. R. 812;
Monongahela vs. *U. S.*, 148 U. S. 312.

The State may create an obstruction to navigation when commerce will be thereby aided.

In *Gilman* vs. *Philadelphia*, 3 Wall. 713, it appears that the State of Pennsylvania in 1857 authorized the City of Philadelphia to erect a permanent bridge over the Schuylkill river at Chestnut street. We quote from the opinion of the Court:

> "The complainants are citizens of other States and own a valuable and productive dock and wharf property above the site of the contemplated bridge. The river is navigable there for vessels drawing from eighteen to twenty feet of water. Commerce has been carried on in all kinds of vessels for many years to and from complainant's property. The bridge will not be more than thirty feet above the ordinary high-water surface of the river and

hence will prevent the passage of vessels having masts. This will largely reduce the income from the property and render it less valuable. The defendants are proceeding to build the bridge under the authority of an act of the Legislature of Pennsylvania. The Schuylkill river is entirely within her limits and is 'an ancient river and common highway of the State'. For many years it has been navigable for masted vessels for the distance of about seven and a half miles only from its mouth."

The Court continued:

"The river, being wholly within her limits, we cannot say the State has exceeded the bounds of her authority. Until the dormant power of the Constitution is awakened and made effective, by appropriate legislation, the reserved power of the States is plenary, and its exercise in good faith cannot be made the subject of review by this Court" (p. 732).

Regarding the State's discretion in such case, it said (p. 729):

"It must not be forgotten that bridges, which are connecting parts of turnpikes, streets and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs."

Following this case, it was said in *Assante* vs. *Chicago Bridge Co.*, 41 F. R. 365:

The bridge "is across a navigable stream of the United States, but in the absence of legislation by Congress, States may authorize bridges across navigable streams by statutes so well guarded as to protect the substantial rights of navigation. Or,

> as it has been put, no State can permit an obstruction of the navigable waters of the United States. But, although every bridge having piers *ex necessitate* is more or less an obstruction, still it may be built if a passage is reserved of sufficient width for the purposes of foreign and domestic commerce."
>
> See also *Rhea* vs. *Newport*, 50 F. R. 16;
> *Willammete Bridge Co.* vs. *Hatch*, 125 U. S. 1.

The State may, in aid of its own commerce, remove obstructions, deepen channels and improve them generally, if such acts do not impair their navigation or defeat any system provided by the general government.

Mobile vs. *Kimball*, 102 U. S. 699.

In the case of the "Mission Rock" improvements, the Government, through the Secretary of War and the Corps of Engineers, recognized the rights of the Dock Company and defined the limits beyond which the United States would not permit further filling up of the channel.

The illustrations above given establish conclusively the "*absolute property in and dominion and sovereignty over all soils under the tidewaters*" which the State possesses, subject only to the paramount right of the Federal Government to control the State's action under the "commerce clause" of the Constitution in reference thereto, or to subject them to the needs of commerce. The necessities of the navy of the United States, which call for a convenient coaling station, are not necessities of commerce with foreign nations or among the several States. Even if they were, the property cannot be

taken except upon compensation to the State's grantee.

The State of California in patenting the land to Tichenor on condition that he should erect "a dock or marine railway at Mission Rock" devoted the land in aid of commerce, an object carried to a conclusion by the Dock Company, which spent enormous sums in making the land available and in the construction of warehouses and docks for commercial purposes.

We submit, therefore, that the lands covered by tide waters were the property of the State, and that the State's title, conveyed to Tichenor, and thereafter conveyed to the Mission Rock Company, vested in the latter absolute dominion therein, subject only to such regulations of the United States with reference to the keeping open of navigable channels as its officers might make. These have been made and complied with, as we have seen.

It needs no argument on our part to support the self-evident proposition that if the title to the submerged lands vested in the plaintiff in error and its predecessor, they had the right to improve them by filling in, and that the area thus made available by being brought above the water level, belongs to the grantee of the State regardless of the ownership by the United States of lands adjoining such submerged lands, if there be such ownership.

II.

"Mission Rock" and the adjacent rocks, caps above the water's surface, were and are parts of the tidal lands, within the meaning of the constitutional principle which gives to each of the sovereign States its navigable waters and the soils under them.

The little cap, which, if rectangular, would at its base at high water enclose a space 78 feet by 78 feet, and the adjacent cap, 20 feet square, though they emerge above the tide waters, are nevertheless part of the dominion and soil which passed to the State upon its admission. They are mere specks upon an enormous surface of land and water belonging to the State. The law will not be guilty of the incongruity which is implied in the assertion that, though the State owns its shore-line from its northern limits to the Mexican boundary, it still does not own the few rocks scattered miles apart and imbedded in the shore, which, by chance, lift their caps sufficiently high to be above ordinary high tide. If the State owns such rocks, then it owns the rocks in controversy, which stand out as mere points above the waters. They are part of the navigable waters and of the soil under the navigable waters. The State may, as we have seen, destroy them as obstructions, or turn them to use as improvements to navigation.

The right to use or destroy is a right of ownership. The right of sovereignty implies the right of defense

of a State's borders. The right would be in theory, nullified if another sovereignty should be allowed to own or dispose of a part of the approaches to those shores.

> "To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers."
>
> *Pollard* vs. *Hagan*, 3 How. 230.

The reason for conceding the right of the State to the lands under navigable waters applies equally to the rocks that project from such waters. In *Shively* vs. *Bowlby*, 152 U. S. 1, 49, the Court said:

> "The Congress of the United States in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and being chiefly valuable for the public purposes of commerce, navigation and fishery, *and for the improvements necessary to secure and promote those purposes*, shall not be granted away during the period of territorial government."

We may well imagine a sand spit rising a foot or two above high-water mark situated at a distance from the ocean shore. Would such spit own a sovereignty other than that of the shore and mainland?

III.

The admission of the State on an equal footing with the original States gave to it all property above and below high water, not already given into private ownership or not reserved by the United States in the Act of Admission. The reservation in that Act was of "public lands". These rocks were not "public lands".

California, upon her admission into the Union upon an equal footing in all respects whatever with the original States, became the proprietor of all lands, above and below the line of tide water, to the same extent that Massachusetts or Virginia, was such owner at the time when she joined the Union, except only so far as the Act of Admission took from California by express words any portion of such dominion.

The ownership of Massachusetts in its shores is described by Chief Justice Gray as follows:

> "The commonwealth of Massachusetts has all the title and rights, public and private, both of the King and the Parliament of England in every part of the seashore of the commonwealth, which has not vested in individuals or corporations under the Colonial ordinance of 1647,or other act of the Government; and the Legislature may grant the title in the soil, or the right to build wharves thereon below as well as above high water mark."
>
> *Nichols* vs. *City of Boston*, 98 Mass. 42.

And the same Judge, speaking lately for the highest Court of the Union, said that the discovery of the

English possessions by British subjects vested in the King

> "all vacant lands and the exclusive power to grant them. * * * And upon the American Revolution all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the National Government by the Constitution of the United States."
> *Shively* vs. *Bowlby*, 152 U. S. 14.

The treaties with England which acknowledged the independence of the United States, gave to the National Government no territory in any State. Although it had for years been in possession of Fort Niagara in New York, it was held by the Supreme Court of that State that the United States had acquired no title thereto

People vs. *Godfrey*, 17 Johns 230, quoted as authority in *Fort Leavenworth* vs. *Lowe*, 114 U. S. 538.

The new State therefore by her admission upon an equal footing with the original States, became endowed with the same title to all lands—uplands, lowlands, tide-lands—within her limits, not already granted and not specially reserved by the United States, as Massachusetts had at the date of the formation of the Union. If the rocks of the Bay of San Francisco were not specially reserved, they became California's property in 1850. They were not so reserved unless they fall within the description of "public lands" to be disposed of by the United States. The Court will note that there is no *reservation* in the Act of any lands what-

ever. The State is admitted upon the condition that she will not *interfere with the primary disposal of the public lands within her limits.* The public lands referred to by the Act are clearly *those public lands which the United States is in the habit of disposing of*, not every parcel of rock, sand spit or river bar within the State's confines which may not have passed into private ownership prior to the Mexican cession.

It is important, therefore, to determine what the legal effect is of the condition annexed to the State's admission, because, as was held in *Pollard's Lessee* vs. *Hagan*, 3 How. 223 (construing similar words upon the admission of Alabama), when the State was admitted, '*nothing remained in the United States*, according to " the terms of the agreements, but the public lands."

These words have been so often construed by the Supreme Court in cases in which the *very question was* whether the words "public lands" included lands below high-water mark, that further controversy on the subject is impossible.

In *Mann* vs. *Tacoma Co.*, 153 U. S. 273, the question decided was whether the holder of Valentine scrip, which, according to its terms, might be located on "*unoccupied and unappropriated public lands*" could by its aid, take up tide lands in the Territory of Washington.

The Court, after quoting from *Shively* vs. *Bowlby*, 152 U. S. 1, said:

" It is unnecessary in view of this recent ex-

amination of the question, to enter into any discussion respecting the same. It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands. There is nothing in the Act authorizing the Valentine scrip, or in the circumstances which gave occasion for its passage, to make an exception to the general rule. It provided that the scrip might be located on the unoccupied and unappropriated public lands, but the term "public lands" does not include tide lands. As said in *Newhall* vs. *Sanger*, 92 U. S. 761, 763: 'The words public lands are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.'" The location was held invalid.

See also

Leavenworth etc. Railroad vs. *United States*, 92 U. S. 733;
Doolan vs *Carr*, 125 U. S. 618;
Newhall vs. *Sanger*, 92 U. S. 761, 763;
Shively vs. *Bowlby*, 152 U. S. 49;
Morris vs. *U. S.*, 174 U. S. 237.

We ask the Court to note the similarity of language in the construction of the Court, that public lands are those subject to *disposal under general laws*, and the condition of the Act of Admission that California should not interfere with the primary *disposal* of the public lands. The Act must, necessarily, be read to prohibit interference with the disposal of those lands which are subject to sale or other disposal under general laws. Isolated rocks, lying in tide waters, barren of soil and water, and of no value for settlement, with neither agricultural or mineral resources, are not

such lands as are held by the government for "disposal under general laws".

> "The United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."
>
> *Barney* vs. *Keokuk*, 94 U. S. 324, 338;
> *Leavenworth* vs. *U. S.*, 92 U. S. 733;
> *Doolan* vs. *Carr*, 125 U. S. 618;
> *Illinois Central* vs. *Illinois*, 146 U. S. 387.

If the foregoing cases establish the rule that no settlement could lawfully be made on Mission Rock under the pre-emption or homestead Acts, it is clear that the rock is not "public land". In *Morris* vs. *U. S. (sup.)* the Court construed the Maryland statutes providing for the disposition of "vacant lands" and held that lands covered by tide water could not have been contemplated

> "because such lands are incapable of ordinary and private occupation, cultivation and improvement, and their natural and primary uses are public in their nature for highways of navigation and commerce."

The Court cites as authority *State* vs. *Pacific Guano Co.*, 22 S. Car. 50.

Indeed, the various public land laws of the United States furnish a legislative interpretation of the words "public lands". It is impossible to read the provisions of these Acts without being convinced that none of them is intended to apply to lands under the navigable waters of the State, or that they have application to

any lands except those which

> "whether in the interior or on the coast, above high water mark, may be taken up by *actual occupants*, in order to encourage the settlement of the country."
>
> *Shively* vs. *Bowlby*, 152 U. S. 49.

And this rule of interpretation is adopted by the Court in *Morris* vs. *U. S. (sup.)* which cites with approval *Alleghany* vs. *Read*, 24 Pa. St. 39, 43. In the last named case a survey was made by the Court of all the statutes governing the disposition of islands in the rivers of the State and upon such survey, it was held that the word "islands" meant such islands as, at the time of application for purchase, *had a soil on them*. Hence an island, once covered with soil, but laid bare by a freshet, so that though entirely exposed in the ordinary stages of the river, the land was covered when the river was very high, was held not to be an island within the meaning of the statute.

Said the Court:

> "The title of the commonwealth to what remained was not gone, but was no longer grantable under the Act of Assembly for selling islands. The foundation of the island belongs to the commonwealth still, but she holds it as she does the beds of the river and all sandbars, in trust for all her citizens *as a public highway*."

This case also fairly supports the defendant's contention that the rocks of the navigable waters and of the tidal lands of the Bay of San Francisco are parts of such waters and lands and belong to the State. They

are parts of the public highway, necessary for the public convenience in the use of the navigable waters, whether for lighthouse purposes, wharves or docks. If the island in the Alleghany which rose above the ordinary high stage of the river was part of the navigable waters of Pennsylvania, there is no reason why a little cap rising out of the midst of the Bay of San Francisco should not be deemed to be part of that body of water.

The foregoing views, we respectfully submit, are fully sustained by an unbroken chain of authority and justly and correctly sustain the defendant's position that as to all tide lands or submerged lands, the title is in the State; that "Mission Rock" is part of such lands, and that if it be not such, it nevertheless belonged to the State as part of the territorial sovereignty or dominion which vested in it on the admission of the State, because it was no part of the "public lands", with the primary disposal of which the State then agreed not to interfere.

We shall not discuss the question of littoral or riparian right advanced in argument by the Government. It is sufficiently answered, even if we should assume that the cap of "Mission Rock" is still vested in the United States, by the statement of the fact that the title of the submerged lands, at the time of filling in, was beyond question in the defendant as the owner of the State's patent, and that it had the right to fill in its own land, if the United States did not interfere on the ground of any consequent injury to navigation. If

the Act was an interference with commerce, the United States should at the time have prevented it, as it could have done. If the filling be such interference now, the United States may by proper proceedings seek the aid of the Courts to force its removal, *but it cannot claim title to the land* upon the ground that the filling in interferes with commerce. If a man builds up a wall on his own land which obscures an ancient light of his neighbor, the latter does not thereby become vested with title to the wrongdoer's land.

IV.

The Act of 1864 did not relinquish any claim of the United States to tidal lands or to rocks in the bay. The Act referred to lands on the mainland. Hence, the President's reservation of "Mission Rock" was nugatory.

The United States assumes in this action that the land in controversy was conveyed by it to the City of San Francisco, by the Statute of July, 1864, which purported to relinquish and grant its title to a larger area,

> "there being excepted from the relinquishment and grant all sites and other parcels of land which have been or now are occupied by the United States for naval, military or other public uses, or *such other sites, or parcels as may hereafter be designated by the President of the United States within one year after the rendition to the General Land Office by the Surveyor-General of an approved plat of the exterior limits of San*

> *Francisco as recognized in this section in connection with the lines of the public surveys*" (13 Stat. 334).

The President, by executive order dated January 13, 1899, purported to set apart

> "Mission Island and the small island southeast thereof * * * containing according to the plat fourteen one-hundredths of an acre and one one-hundredth of an acre * * * for naval purposes."

In face of the language of the order, it is hardly worth while to discuss the proposition advanced by counsel for the Government, that the President did, or intended to set aside more than the rocks which he named or a greater area than that which he designated. The order did not specify the filled up lands which are now above tide water, nearly four acres in extent. It must be construed according to its words. Indeed, it is itself an admission by the executive department of the title of the plaintiff in error to the surrounding lands. The only question is as to the legal effect of the order.

The Statute of 1864 should be read in the light of contemporaneous events. These are fully set out in *San Francisco* vs. *Leroy*, 138 U. S. 665. It there appears, and it is part of the records of the Circuit Court for the Ninth Circuit that in June, 1855, there was pending in the United States District Court, the application of the City of San Francisco for confirmation of its title, as a pueblo, to four square leagues of land on the peninsula. In that month, the Van Ness ordinance

was adopted by the Common Council, by which the Mayor was directed to enter in the proper land office " all the lands *above the natural high-water mark of the Bay of San Francisco*" within the corporate limits of the City, which lands the City was to hold "in trust for " the several use, benefit and behoof of the occupants " or possessors thereof". The ordinance also provides that ratification of its provisions should be sought from the Legislature and application be made to Congress " to relinquish all the right and title of the United " States to the said lands, for the uses and purposes " hereinbefore specified".

It is quite clear that this step was taken to protect the inhabitants of the City against a possible adverse decision by the District Court. In 1858 the Legislature ratified the ordinance. In 1864 Congress relinquished its interest in favor of San Francisco to the lands comprised within the charter limits of 1851, as defined in the ordinance, reserving, however, in the words already quoted, the right of excepting from the relinquishment, sites and parcels as might be designated by the President within the time stated in the Act. Before a year had elapsed from the date of the Act of 1864, it became, as to all lands on the peninsula, *functus officio* by reason of the decree of the United States Circuit Court of May, 1865, which confirmed to the City, as successor of the Mexican pueblo, four square leagues of land on the peninsula above ordinary high water mark. *The title to the site of San Francisco*

was thus found to antedate the cession of California. The Act of 1864, therefore, if the United States had nothing to convey, relinquished nothing to the City of San Francisco, and if it had held that its intention was that it should act upon the lands referred to in the Van Ness ordinance and if these lands did not include lands lying below high water-mark, the Act of 1864 did not convey "Mission Rock". In 1866, an appeal then being pending before the Supreme Court of the United States from the decree of the Circuit Court, the aid of Congress was sought to prevent that decree from being disturbed. That body passed the Act of March 8, 1866, confirming the decree establishing the pueblo title and relinquishing the claim of the United States to the lands included within it. That Act caused necessarily the dismissal of the appeal. The title of the pueblo under the decree thus became final. It would seem from this recital that, possibly excepting "Mission Rock", the Act of 1864 conveyed nothing to the City. The relinquishment of title by the United States to property decreed to have been, since the date of its organization, in the City by virtue of its right of succession to the Mexican pueblo, added nothing to the already perfect title established by the decree. The only question then, is whether the Van Ness ordinance, which was the basis of the Act of 1864, included lands not lying on the peninsula, such as an uninhabitable rock of insignificant dimensions out in the bay. The express object of the ordinance was to secure to

the "*occupants and possessors*" of lands within the corporate limits the benefit of the title to the lands occupied by them. The lands "above high water mark of the Bay of San Francisco", the title to which was sought by application to the United States for the behoof and benefit of such "occupants and possessors", were presumably the same lands for which the City was contending in the Court at this time on behalf of the same persons. The lands claimed for the pueblo included only lands on the peninsula above high water mark and, therefore, excluded "Mission Rock". It is only reasonable to assume that these were the lands applied for by the ordinance and that these did not include the rock. When therefore, the decree of the Circuit Court confirmed to the City the four square leagues owned by the pueblo, excluding therefrom "such lands as have been heretofore reserved or dedi- "cated to public uses by the United States", it estopped the parties to the suit (the United States and San Francisco), from thereafter claiming title to any lands within the pueblo limits, not adjudicated to them by the decree. The power of reservation given to the President by the Act of 1864 was thus declared to have nothing upon which to operate, unless "Mission Rock" should be held to have been granted to the City by that Act, and this rock, as we have seen, was never within the intention or reason of the ordinance, or the statutes of California or the United States.

" A thing which is within the letter of the stat-

ute is not within the statute, unless it be within the intention of the makers."

1 Bac. Abr., 247, quoted and applied in an analogous case;

Leavenworth vs. *U. S.*, 92 U. S. 733, 741.

The failure of the Surveyor-General to file a map in the General Land Office "in connection" with the lines " of the public surveys" as recognized in the fifth section of the Act, and the omission of the President for thirty-six years to take any action are, themselves, a construction of the Act by the executive department to the effect contended for by us, that the lands there referred to were the lands being contended for by the pueblo.

V.

Assuming that "Mission Rock" was included in the meaning of the Act, then the title passed to the City of San Francisco. It has not since been revested in the United States, so that the latter can maintain ejectment for the rock.

If we accept the Government's contention and admit that "Mission Rock" was intended to be covered by the area defined in the Act of Congress from which exceptions might be made under the terms of the Act, there are still insuperable objections to the maintenance of this action. Ejectment cannot possibly lie to recover lands, the title to which has been conveyed by the plaintiff subject to an exception which is undefined in the

grant. Upon the Government's theory, the title to "Mission Rock" has been in the City of San Francisco for thirty-six years. The exception in the Act of Congress is of such site or sites as, after the filing of a map to be thereafter made, the President might, within a year, select for public purposes. The exception was void for uncertainty. An exception in a deed must be a portion of the thing granted, or described as granted, and which would otherwise pass by the grant.

Brown vs. *Allen*, 43 Me. 590.

The same certainty of description is required in an exception out of a grant as in the grant itself, and where a deed excepts out of a conveyance one acre of land and there is nothing in the exception, or evidence to locate it upon any particular part of the tract, the exception is void for uncertainty, and the grantee takes the entire tract.

Mooney vs. *Cooledge*, 30 Ark. 640;
Darling vs. *Crowell*, 6 N. H. 421;
Andrews vs. *Todd*, 50 N. H. 565;
Waugh vs. *Richardson*, 30 N. C. 470; s. c. 8 Iredell, 470.

It must be conceded, then, that the exception retained no title in the United States to any part of the land granted. So far as "Mission Rock" is concerned, the title has never re-vested, nor has the United States ever entered or obtained possession.

In a case in which the exception was of "three-fourths of an acre as a burying ground" the Court

held that the evidence showed what the precise land intended to be reserved was, but it said:

> "It is well settled that in such cases the uncertainty may be cured by the election of the grantor, *which, however, must be made in a reasonable time.*"
>
> *Benn* vs. *Hatcher*, 81 Va. 85.

Where the reservation in the deed was not specific enough to take it out of the words of conveyance, the land could not be recovered *in ejectment.*

Butcher vs. *Creel's Heirs*, 9 Gratt. 201.

The exception in the Act of 1864 is repugnant to the grant, and therefore void.

> "Every saving which crosses the grant is, so far as it is repugnant, of no force; and *it is repugnant wherever the things must necessarily pass in the first instance to satisfy the words.*"
>
> *Shoenberger* vs. *Lyon*, 7 W. & S. 184.

In *Stamburgh* vs. *Hollabaugh*, 10 S. & R. 357, A conveyed 142 acres to B in fee, "excepting a small "quantity struck off the said tract at the west end by "a conditional line". The line was not marked and could not be ascertained. Twenty-three years afterwards, A came upon the land, had twenty-one acres surveyed, pointed them out to his vendee and deeded them. It was held that A's vendee had no title. The Court said:

> "But the reservation of a small quantity is so very uncertain, I doubt whether so vague an exception could be supported. * * * How could a purchaser know what or where he was buying? The land could be locked up from any description

> of improvement, until it pleased the grantor to strike off what he pleased, or where he pleased. Can it consist with any principle of property, or any certainty or security in conveyances and possession, that at the end of 23 years, the grantor point out with the swing of his whip, where it was to begin, though he confesses it appears a strange wood to him, and then leave it to them an to whom he was about to sell the small quantity, to gut the whole and scoop out the marrow of the land; and can it depend on his nod, how much he is to take, under the denomination of a small quantity. * * *The title of the whole would pass, for in 23 years the presumption would be that this undefined small quantity has been abandoned to the grantee.*"

The curious analogy of this case to the case at bar and the caustic remarks of the Judge are not weakened by recalling the facts that the Act of 1864 is "an Act "to *expedite* the settlement of land claims in Cali- "fornia * * * ", that the power, as it is claimed, is given to the President to take property worth millions from the inhabitants, or, in his discretion, to take nothing at all, and that by holding back the survey of the land by his subordinate officer or the filing of the "approved plat" in the general land office, he may postpone the right of selection until such time as a merciful Congress may repeal the law itself.

In 1865 the Circuit Court nullified the Act by its "Pueblo" decree, as to all the lands on the peninsula of San Francisco. The exact limits of the rights of the United States were in that decree settled for ever. The Court held then, that the right of San Francisco to the lands on the peninsula antedated the cession by

Mexico to the United States. We have already seen that all of the tidal lands passed to the State by the Act of Admission. Goat Island, Angel Island and Alcatraz Island were excluded from the grant by the terms of the Act of 1864—these and other lands having been reserved to public uses in 1850 by the executive—and the peninsula belonged to the Pueblo before the cession, though the exact limits of the Pueblo had not been determined. There was, therefore, *nothing left in the United States* within the boundaries referred to in the Act which could pass to San Francisco by the Act of 1864 *except Mission Rock* and the smaller rocks which every year or two are being blown out of the water. If "Mission Rock" was, in fact, all that the United States could pass by its deed, the gift, it seems, was an Indian gift. It has been recalled. The exception as now sought to be enforced, covers *the entire estate granted by that Act*. The United States must be held to know the law as much as the private citizen. Hence, when the grant of the Act of 1864 was made, it knew that it was conveying only "Mission Rock". When it created the exception which, if lawful, would take away "Mission Rock", it created an exception repugnant to the grant, which exception was, for that reason, void.

The evidence further shows that the map which was to be filed by the Surveyor-General in the land office has not yet been filed. The right of the President to make a selection or reservation is, by the terms of the

Act, to vest upon the filing of the map, and not before. He had no power to make the reservation when he did so.

In whatever way we view the matter, it certainly seems clear that the exception cannot authorize an action of ejectment, success in which would take from the plaintiff in error, lawfully in possession of the title of the grantee under the Act, not the lands merely, but vast and costly improvements. Whatever title the State had, the plaintiff in error has by virtue of a patent; whatever title the city had, the plaintiff in error has, by virtue of its independent and adverse occupancy for nearly thirty years.

We have not entered into a discussion of littoral rights or those of accretion. These are clearly inapplicable, whatever the law may be, *first*, because the plaintiff in error is the undoubted owner of the lands surrounding the rocks upon which its predecessor created the area of land now above tide water, which area is termed "accretions" by the Government's counsel; *second*, because the President has not set apart the "accretions" by his order, but only the land containing fourteen one-hundredths of an acre known as "Mission Island" and the "small island northeast thereof", which contains one one-hundredth of an acre. Counsel for the United States suggests, as an argument in favor of a presumed intention by the Government not to allow private ownership or State ownership of submerged lands surrounding its islands, that such ownership

would be inconsistent with their use for public purposes, and it is suggested that "Alcatraz", as a means of defense, would be rendered useless were it permissible to the State to grant such lands. The answer to this suggestion is best found in the evidence in the case at bar. The United States engineers, with the approval of the War Department, have drawn the line beyond which the plaintiff in error shall not use *its own land.* At this line, the Government declares that the channels of commerce begin. The ownership of the plaintiff in error beyond this line can avail it nothing. The National Government is supreme in its power over navigable waters. Hence, though the State should sell every foot of tide and submerged land round "Alcatraz Island", the purchaser would take the title subject, always, to the control of the United States over the waters covering them. At its will, the original depth and the free navigation of these, may continue forever.

The plaintiff in error submits that the judgment should be reversed and that judgment should be ordered to be entered on the findings in favor of the Mission Rock Company.

Respectfully submitted,

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